

-PS-O-

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID F. TUSZYNSKI,

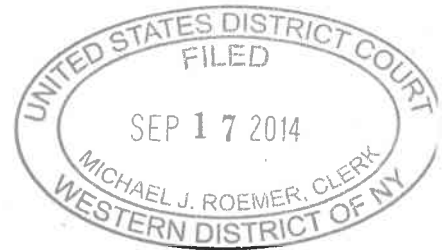
Petitioner,

-v-

13-CV-0401F
ORDER

DAVID STALLONE, Dep. of Correcitons, Cayuga
Correctional Facility,

Respondent.



Upon the filing of a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, petitioner was directed to show cause why his petition was not untimely and to complete a § 2254 Timeliness Response Form. (Docket No. 4., Order.) Petitioner submitted a Response (Docket No. 6, "Response"), outlining, in part, the state court direct appeal process, and the filings of two state court post-convictions motions or proceedings he had filed prior to the time he had filed the instant petition; one a motion to vacate his conviction pursuant to N.Y.C.P.L.R. § 440.10 and one a petition for a writ of habeas corpus. (*Id.*) The state court petition was still pending at the time the Response was filed. Petitioner also filed a motion to stay the instant petition due to the pendency of his request for a certificate granting leave to appeal to the New York Court of Appeals upon the denial of his state court petition. (Docket Nos. 7 and 8.) That request was ultimately denied on July 1, 2014 by the Court of Appeals, and this Court denied the motion for a stay as moot. (Docket No. 9.) Accordingly, IT HEREBY IS ORDERED as follows:

1. Respondent shall file and serve an **answer** to the petition, in accordance with Rules 4 and 5 of the Rules Governing Section 2254 Cases in the United States District

Courts, no later than **ninety (90) days** after entry of this order. Further, the answer shall state whether a trial or any pre-trial or post-trial evidentiary proceeding was conducted. If any such proceeding was conducted, under the authority of Rule 4, the Court hereby directs respondent to provide to the Court the transcript of the proceeding, together with any record(s) of, and documents relating to, such proceeding, and such documents will be filed in the official record of this case.

Respondent also shall file and serve by the above date a **memorandum of law** addressing each of the issues raised in the petition and including citations of relevant supporting authority.

Within thirty (30) days of the date this order is served upon the custodian of the records, the Clerk of Court or any other official having custody of the records of the proceedings in County Court at issue now before this Court shall submit such records to respondent or the respondent's duly authorized representative.

If petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, under the authority of Rule 4, the Court hereby directs respondent to provide to the Court a copy of the briefs and record on appeal and the opinions of the appellate courts, if any, and such documents will be filed in the official record of this case.

Petitioner shall have thirty (30) days upon receipt of the answer to file a written response to the answer and memorandum of law.

Within thirty (30) days of the date this order is filed with the Clerk of Court, respondent may file a motion for a more definite statement or a motion to dismiss the petition, accompanied by appropriate exhibits which demonstrate that an answer to the petition is

unnecessary. The timely filing of such motion shall extend the time for filing an answer for fourteen (14) days, but the failure of the Court to act upon the motion within that time shall not further extend the time for filing an answer.

2. Petitioner's renewed request for the appointment of counsel (Docket No. 8)¹ is denied without prejudice as premature, see Rules Governing Section 2254 Cases in the United States District Courts, Rule 8(c); *Graham v. Portuondo*, 506 F.3d 105 (2d Cir. 2007); see also *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Murray v. Giarratano*, 492 U.S. 1 (1989) (Prisoners have no constitutional right to counsel when bringing collateral attacks upon their convictions).

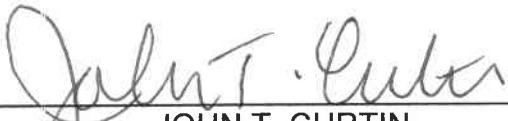
3. The Clerk of Court shall serve a copy of the petition, together with a copy of this order, electronically via a Notice of Electronic Filing to Alyson Gill <Alyson.Gill@ag.ny.gov> and Arlene.Roces@ag.ny.gov of the Office of the Attorney General, Federal Habeas Unit.

PETITIONER MUST FORWARD A COPY OF ALL FUTURE PAPERS AND CORRESPONDENCE TO THE ATTORNEY APPEARING FOR RESPONDENT.

SO ORDERED.

DATED:

9/17, 2014
Buffalo, New York



JOHN T. CURTIN
United States District Judge

¹Petitioner also requested in this filing (Docket No. 8) permission to file with the Court the papers submitted on the state court habeas proceeding. In this Order, respondent is directed to have the documents submitted on all state court post-conviction proceedings submitted to the Court. Petitioner therefore does not need to submit these documents as they would be duplicative. Accordingly, the request is denied without prejudice.